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Torts

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TORTS

I. MOTOR VEHICLE TORT CLAIMS ACT

In two closely decided opinions, the South Carolina Supreme Court dealt with the scope of the South Carolina Governmental Motor Vehicle Tort Claims Act[1] and the right to a cause of action provided therein. Both *Truesdale v. South Carolina Highway Dep't*[2] and *Morris v. South Carolina State Highway Dep't*[3] were cases of first impression and both turned on the correct legal definition of terms used within the Act.

Truesdale was a wrongful death action brought by the parents of a 9-year-old girl who was struck and killed by a motorist while pursuing a puppy into the highway in front of an improperly parked truck owned by the defendant-appellant. The plaintiff-respondents, as administrators of the deceased child's estate, brought an action against the motorist and the appellant seeking damages in the total amount of $35,000. Prior to the trial the Truesdales executed a covenant not to sue the motorist for a consideration of $6,000. Over the Department's objection, the respondents were allowed to amend their complaint eliminating the motorist as a party, thereby seeking judgment against the Department alone. The jury found for the plaintiffs in the sum of $35,000, which the trial judge reduced to the statutory maximum of $10,000.[4]

The Truesdales sought recovery against the Department based on the negligence of an employee of the Department in parking his pickup truck partially on the highway, thereby obstructing the view of oncoming cars as well as that of the highway. A number of children were playing in the area. In addition to the pickup truck, there were several other Department vehicles parked in the area, but off the highway, which completely obscured the motorist's and child's view of each other until just before the impact. There was no flagman or sign of any kind warning of the obstruction.[5]

1. S.C. CODE ANN. §§ 10-2621 to -2625 (Cum. Supp. 1975) [hereinafter cited as the Tort Claims Act].
2. 264 S.C. 221, 213 S.E.2d 740 (1975).
3. 264 S.C. 369, 215 S.E.2d 430 (1975).
4. *See* note 6 *infra.*
5. 264 S.C. 221, 225-26, 213 S.E.2d 740, 742 (1975).

The Department maintained that the pickup truck was not in "operation" within the meaning of section 10-2623[6] and, therefore, that the death of the infant was not caused by the "negligent operation" of the Department's vehicle. Because the statute was in derogation of the general common law principal of sovereign immunity,[7] the Department contended that it should be strictly construed.[8] Such a strict construction, it was argued, would limit recovery under the statute to only those situations where the mechanism of the motor vehicle was engaged and the vehicle was actually in motion.

While agreeing with the premise that the Tort Claims Act must be strictly construed, Justice Bussey, writing for the three-man majority, disagreed with the conclusion that a parked vehicle was not in operation within the meaning of the statute. Quoting Lord Coke's well-known pronouncement on interpreting statutes,[9] the majority concluded that the legislative intent of the

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6. S.C. CODE ANN. § 10-2623 (Cum. Supp. 1975) in pertinent part reads as follows:

> Any person sustaining an injury by reason of the negligent operation of any motor vehicle while being operated by an employee of a governmental entity while in and about the official business of such governmental entity may recover in an action against such governmental entity such actual damages as he may sustain; *provided,*
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> . . . .
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> (c) No person shall recover . . . a sum exceeding ten thousand dollars for personal injury . . . .

7. In South Carolina neither the State nor any of its political subdivisions is liable in an action *ex delicto* unless expressly authorized by statute, except where the acts complained of constitute a taking of private property for public use without just compensation. Graham v. Charleston Cty. School Bd., 262 S.C. 314, 204 S.E.2d 384 (1974); Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940).

8. *See, e.g.*, Vernon v. Harleyville Mut. Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964) ("Where the terms of statutes are positive and unambiguous, exceptions not made by the Legislature cannot be read into the Act by implication. . . . Where there is an express exception in a statute, all other exceptions which are not expressly set forth are excluded."); Davis v. City of Greenville, 168 S.C. 476, 480, 167 S.E. 682, 683 (1933) ([T]he Court is not permitted to give the statute a liberal construction, because the Act is in derogation of the sovereignty of the State and must be strictly construed . . . .")

9. [F]or the full and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered. 1st. What was the common law before the making of the act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And, 4th. The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act . . . .

statute was to provide private citizens with a remedy for the actual damages caused by the negligent operation of motor vehicles by government employees. The majority then evaluated the Department's contention in light of this legislative intent and determined that a strict interpretation of the phrase "while being operated by an employee," such as the interpretation proposed by the Department, would defeat the intent of the statute. Examining the facts the majority noted "that the stopping or parking of the motor vehicle was part and parcel of the operation thereof. . . ."[10]

In reaching this conclusion the majority relied, in part, upon *Deese v. Williams*,[11] a 1961 case involving a similar situation. The cause of action in *Deese* was based on section 33-229 of the Code,[12] which was the statute establishing the liability of the Department prior to the adoption of the Tort Claims Act in 1968.[13] Section 33-229 allowed the Department to be sued by "[a]ny person who may suffer injury to his person or damage to his property by reason of . . . the negligent operation of any vehicle or motor vehicle . . . being operated on official business of the Department. . . ."[14] A dispute arose as to whether or not the Department's vehicle was actually in motion or was completely stopped when the collision occurred. In reaching its decision the supreme court assumed the truck was not in motion but predicated the Department's liability on the Department's failure to meet its duty to provide adequate warning to oncoming motorists that the truck was blocking the highway. "[T]he discharge of this duty

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Heydon's Case, 3 Co. Rep. 72, 76 Eng. Rep. 637 (Q.B. 1584), *as quoted in* 264 S.C. at 228, 213 S.E.2d at 743.

10. 264 S.C. at 229, 213 S.E.2d at 744.

11. 237 S.C. 560, 118 S.E.2d 330 (1961).

12. S.C. CODE ANN. § 33-229 (1962), *as amended,* S.C. CODE ANN. § 33-229 (Cum. Supp. 1975).

13. No. 1273, [1968] S.C. Acts & Jt. Res. 3027.

14. S.C. CODE ANN. § 33-229 (1962). The entire version in effect when *Deese* was decided read as follows:

> Any person who may suffer injury to his person or damage to his property by reason of (a) a defect in any State highway, (b) the negligent repair of any State highway or (c) the negligent operation of any vehicle or motor vehicle in charge of the State Highway Department while such vehicle or motor vehicle is actually engaged in the construction or repair of any of such highways or while otherwise being operated on official business of the Department may bring suit against the Department for the actual amount of such injury or damage the sum of three thousand dollars and in case of personal injury or death the sum of eight thousand dollars.

was directly connected with the operation of the truck."[15] To some extent the supreme court's decision in *Deese* was based on two earlier cases — *Smoak v. Charleston Cty.*[16] and *Epps v. South Carolina State Highway Dep't.*[17] These two cases clearly established that governmental entities which obstructed a highway while performing official business had a responsibility to provide motorists with a reasonable warning of the obstructions in order to enable them "to avoid injury to themselves and others."[18]

In light of *Smoak* and *Epps,* a cause of action under the facts in *Truesdale* might well have arisen under the existing section 33-229 of the Code[19] which makes the Department liable for "any defect in the highway."[20] Under *Smoak* a temporary obstruction in a highway where there is a failure of "such precautions against collisions . . . as prudence and the safety of the traveler would suggest,"[21] subjects the governmental entity creating the obstruction to liability for a defect in the highway.[22]

These cases seem clearly to establish the Department's liability under the facts of *Truesdale*[23] since the Department's truck was at least partially obstructing the roadway and there was no sign or flagman to warn oncoming motorists of the danger. While both *Smoak* and *Epps* involved plaintiff-motorists who were injured by collisions precipitated by the negligence of the governmental entity involved, the duty of the governmental entities toward the motorists, as discerned by the supreme court in those

15. 237 S.C. 560, 566, 118 S.E.2d 330, 333 (1961).
16. 128 S.C. 379, 122 S.E. 862 (1924).
17. 209 S.C. 125, 39 S.E.2d 198 (1946).
18. *Id.* at 132, 39 S.E.2d at 201.
19. Section 33-229 now reads as follows:

> Any person who may suffer injury to his person or damage to his property by reason of (a) a defect in any State highway or (b) the negligent repair of any State Highway may bring suit against the Department for the actual amount of such injury or damage, not to exceed in case of property damage the sum of three thousand dollars and in case of personal injury or death the sum of eight thousand dollars. *Provided, however,* that no person may bring such suits against the State Highway Department as a consequence or result of any defect in any highway, or the negligent repair of any highway within the corporate limits of a municipality which may have resulted from any overt act by a municipality in the improvement or maintenance by the municipality of such highway as a city street.

S.C. CODE ANN. § 33-229 (Cum. Supp. 1975).
20. *Id.*
21. 128 S.C. 379, 383, 122 S.E. 862, 863 (1924).
22. *Id.*
23. *See* text accompanying note 36 *supra.*

cases, may be readily analogized and applied to the facts in *Truesdale*. The probable reason for the plaintiff's failing to seek relief under section 33-229 and relying instead on section 10-2623 is the difference in recovery allowed under each section. Section 33-229 limits recovery for personal injury to $8,000.00,[24] while section 10-2623 allows a maximum recovery for personal injury of $10,000.00.[25]

The Department also argued that it should be exempted from liability by section 46-290[26] which provides, in part, that the provisions of the Uniform Act Regulating Traffic[27] "shall not apply to . . . motor vehicles . . . while actually engaged in work upon the surface of a highway. . . ."[28] Concurring with the logic of the supreme court of New Mexico which had had occasion to construe identical statutory language,[29] the South Carolina Supreme Court held that the exemption provided by section 46-290 had to be strictly construed against the party claiming the exemption, that party having to show a clear and unmistakable right to the benefits of the exemption.[30] The court noted that stopping the pickup truck so as to partially obstruct the road "was neither necessary nor incidental to any work upon the surface of the highway and hence not within the intent or purpose of the exemption provision."[31]

The final substantial objection[32] raised by the Department

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24. *See* note 19 *supra*.

25. *See* note 6 *supra*.

26. S.C. CODE ANN. § 46-290 (1962).

27. S.C. CODE ANN. § 46-201 (1962).

28. S.C. CODE ANN. § 46-290 (1962) reads as follows:

> The provisions of this chapter applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this State or any county, city, town, district or any other political subdivision of the State, except as provided in this section and subject to such specific exceptions as are set forth in this chapter with reference to authorized emergency vehicles. The provisions of this chapter shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway, but shall apply to such persons and vehicles when traveling to or from such work.

29. Sturgeon v. Clark, 69 N. Mex. 132, 364 P.2d 757 (1961).

30. 264 S.C. at 232, 213 S.E.2d at 745.

31. *Id.* at 233, 213 S.E.2d at 745.

32. The Department also raised two other objections which the supreme court easily disposed of. First the Department argued that the deceased child was, as a matter of law, guilty of contributory negligence. The supreme court disagreed finding sufficient evidence existed on this point to submit it to the jury. *Id.*

Second the Department contended that the negligence of the motorist was the sole proximate cause of the fatal accident or that in any event the negligent parking of the

was that the trial judge erred by not restricting plaintiff's prayer for relief to the statutory maximum of $10,000 against which should have been credited the $6,000 received by plaintiff from the motorist in return for the covenant not to sue. Thus, the Department argued, its liability should be restricted to a maximum of $4,000. The supreme court disagreed affirming the trial court's decision to submit plaintiff's full prayer for relief and, subsequent to the jury's determination of damages, first to credit the verdict with the $6,000 from the covenant not to sue, thus reducing the verdict to $29,000, and then further to reduce that amount to the statutory maximum of $10,000. This still left $19,000 of the verdict unsatisfied. The supreme court noted in dictum that the Department "would have been entitled to *pro tanto* relief if, but only if, the total damages had been found to be something less than $16,000."[33]

Chief Justice Moss dissented vigorously from the majority opinion. The substance of his dissent was that a parked vehicle was not intended to be included under the exemption to sovereign immunity provided by section 10-2623. Quoting the definition of operation provided in *Corpus Juris Secondum,*[34] he concluded that "operation" did not include parking of the vehicle. As the only member of the *Truesdale* court who also had sat on the *Deese* court, Chief Justice Moss argued that the majority's reliance on *Deese* was misplaced, contending that the truck in *Deese* was actually engaged in the repair of the highway. The majority de-

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truck was not the proximate cause. The supreme court noted that one of the cases cited by the Department correctly set forth the rule of intervening negligence and quoted from the case:

> The test, therefore, by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of the attendant circumstances.

Locklear v. Southeastern Stages, 193 S.C. 309, 319, 8 S.E.2d 321, 325 (1940). The supreme court held that the question of proximate cause was clearly for the jury after applying the foregoing test to the instant facts. 264 S.C. at 234, 213 S.E.2d at 746; *see* text accompanying note 5 *supra.*

33. 264 S.C. at 235, 213 S.E.2d at 747.

34. 60 C.J.S. *Motor Vehicles* § 6(2), at 160:

> Operation. Ordinarily the word "operation," when used in relation to motor vehicles, refers to the physical act of working the mechanism of the vehicle; the actual physical driving and the handling of the motor vehicle; the manipulation of the controls of a car in order to move it as a vehicle; but it is not limited to the movement of the car alone, and includes such stops as motor vehicles ordinarily make in the course of their operation.

cided that the pickup truck in *Truesdale* was not engaged in any work upon the surface of the highway.[35] Thus, the Chief Justice contended, a distinction exists. However, that distinction is a distinction without a difference because it was unnecessary for the supreme court to determine whether or not the snow-plow in *Deese* was actually engaged in the repair of the highway, since it was unquestionably engaged in official business when the accident occurred.[36]

The second and more important distinction the Chief Justice drew between *Deese* and *Truesdale* was that the truck in *Deese,* even if stopped, was attended and had its mechanism engaged. In *Truesdale,* on the other hand, the truck was unattended and the motor was turned off. These two facts were deemed to exclude any legitimate finding that the truck was in "operation" under any normally understood definition of the word. Even so, it is apparent that the majority of the court had a better grasp of the intent of the legislature. The passage of the South Carolina Governmental Motor Vehicle Tort Claims Act was intended to allow redress to individuals injured by the negligent operation of official vehicles on official business. To preclude from the definition of "operation" under the Act something as incidental to the accomplishment of official business as parking would leave a gaping hole in the remedial fabric the legislature had intended to weave. To use a hyperbolized example, the definition championed by Chief Justice Moss would exempt the Department from liability for the negligence of an employee who left a truck parked in the middle of a highway over the top of a rise out of the sight of oncoming motorists and provided no sign or flagman to warn those motorists. Even assuming the truck was involved in the repair of the highway and thus exempt from the provision of the Uniform Act Regulating Traffic and therefore not guilty of negligence per se, the thrust of *Deese, Smoak* and *Epps,* nevertheless, is that the Department will be held liable for negligently failing to take adequate precautions to prevent those types of accidents which might be reasonably foreseen. The legislature surely did not intend to exempt the Department from liability merely because the truck was unattended and the motor was turned off. Rather their intent was to make the Department liable for its

35. *See* text accompanying note 31 *supra.*

36. This was a second, and broader, ground for recovery under Section 33-229. *See* note 14 *supra.*

actions in performing its official business except in those few situations where those actions created an unforeseeable danger. *Truesdale* advances this intention to make the Department liable for the foreseeable risk it creates without making it strictly liable for all the dangers caused by its activities.

In *Morris* the supreme court faced a second case of first impression involving the South Carolina Governmental Motor Vehicle Tort Claims Act. *Morris*, like *Truesdale*, was a wrongful death action brought under section 10-2623. The plaintiff's decedent was killed in a collision with a South Carolina Highway Patrol vehicle driven by a highway patrolman. The jury returned a verdict for the respondent for $6,000, and the Department appealed contending that the patrolman was not on duty at the time of the accident, that he was in fact on a personal trip in the company of his wife, and therefore, that he was not engaged in "official business" within the meaning of section 10-2623. The trial court found that the patrolman was using the patrol car with the express permission of his superiors in accordance with a general departmental policy encouraging patrolmen to use official vehicles for private trips during their off-duty hours, thereby increasing the "presence" of Highway Patrol vehicles on the highway. The trial court overruled motions for a directed verdict and for judgment notwithstanding the verdict. The supreme court reversed.

Justice Littlejohn, writing for the 3-man majority, held that section 10-2623 must be strictly construed since it waived the sovereign immunity of the State. The majority then noted the apparent realization of the legislature that official vehicles would be driven other than on official business and their intention that the waiver of sovereign immunity under section 10-2623 should not extend to such trips.[37] Finally the majority dismissed the respondent's arguments that the trip constituted official business because the patrolman retained the right to arrest, because his very presence had a good influence on other drivers, and because

37. *But see* text accompanying note 39 *infra*. One other possible explanation for the inclusion of the "official business" language in the statute (language Justice Bussey found superfluous in his dissent, 264 S.C. at 375-76, 215 S.E.2d at 433,) is the desire of the legislature to make the State liable for acts of its agents over which it had some control but not to make the State strictly liable for all acts of its agents. "Joy rides" and other such unauthorized uses of government vehicles would thus be excluded from those acts for which the State could be held liable. Contrarily, those forays in a motor vehicle done in furtherance of some governmental business would be included.

he might be of some service in an accident. The supreme court felt that these benefits were too remote to justify a finding that the patrolman was "in and about the official business of . . .[a] governmental entity."[38]

Justice Bussey, who wrote the majority opinion in *Truesdale,* dissented vigorously, as did Justice Ness, who did not sit on the *Truesdale* court. Justice Bussey argued that under settled law "governmental entities have no business except 'official business'. . . ."[39] He then asserted that "[t]he purpose of Section 10-2623 is to put governmental entities, subject to certain statutory limitations, in the same position as such would have occupied if private employers."[40] This would make governmental entities liable under the doctrine of *respondeat superior* for the negligent acts of its servants to the same, but no greater, extent as other employers.

Justice Bussey noted that a trial court in deciding whether or not to grant a motion for a directed verdict must view all the evidence in a light most favorable to the plaintiff. He then reviewed the evidence, noting that the patrolman was in uniform, driving an official vehicle with the approval and actual encouragement of the Department which paid for all the gasoline and maintenance for the vehicle. The Department acknowledged that the patrolman retained his authority to arrest and that his presence on the highway in uniform driving an official vehicle tended to promote safer driving, one of the objectives of the Department.[41]

Concluding from this evidence that a jury might reasonably find that the patrolman was acting within the scope of his duty and was therefore on or about official business, Justice Bussey quoted from the *Restatement (Second) of Agency:*

> The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act is otherwise within the service, ...[42]

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38. S.C. CODE ANN. § 10-2623. *See* note 6 *supra.*

39. 264 S.C. at 375, 215 S.E.2d at 433.

40. *Id.* at 376, 215 S.E.2d at 433.

41. *See* S.C. CODE ANN. § 46-854 (1962). This section imposes on patrolmen the duty to patrol the highway to enforce the traffic laws.

42. RESTATEMENT (SECOND) OF AGENCY § 236, comment b (1957) *as quoted in* 264 S.C. at 378, 215 S.E.2d at 434.

Finally, Justice Bussey found the language used in the case of *League v. National Surety Corp.*[43] pertinent to the situation in *Morris. League* involved the recovery of damages from the bonding agent of an off-duty uniformed patrolman whose actions, precipitated by drinking, caused a serious accident. In that case the court noted the significance of the officer's being in uniform at the time of the accident, finding thereby that his actions were colorably in his office and that the bonding agent was therefore required to respond to the verdict.

Justice Ness also dissented from the majority opinion, but for somewhat different and more compelling grounds. He disagreed with Justice Bussey about the pertinency of *League,* finding that the appearance of the patrolman was only incidentally related to the reasons he felt the State should be held liable in *Morris.* In analyzing the facts of *Morris* Justice Ness found that the duty of the Department was "the utilization of its personnel and equipment as it 'may deem necessarily proper for the enforcement of the traffic and other related laws.' "[44] In an effort to accomplish this objective, the Department had for a long period of time allowed officers to use patrol vehicles during times when they were not actually on duty.

Citing *South Carolina Nat'l Bank v. Florence Sporting Goods, Inc.*[45] and *Whitmire v. Cass,*[46] Justice Ness noted that the adoption of a policy by a duly authorized state commission "is presumed to be in furtherance of the faithful discharge of its duty."[47] Indeed, the majority noted that the policy of allowing off-duty officers the free use of patrol vehicles tended to further the goals and objectives of the Department. Justice Ness did not view that benefit as remote but rather saw it as "reasonably calculated to achieve the end of promotion of vehicular safety,"[48] and consequently concluded that "as a matter of law, the patrolman was 'in and about the official business' of the Highway Department or at the very least, the issue was properly submitted to the jury whose resolution of same against the Department finds abundant support in the record."[49]

43. 198 S.C. 298, 17 S.E.2d 783 (1941).
44. *See* S.C. CODE ANN. § 46-851 (1962).
45. 241 S.C. 110, 127 S.E.2d 199 (1962).
46. 213 S.C. 230, 49 S.E.2d 1 (1948).
47. 264 S.C. at 380, 215 S.E.2d at 435.
48. *Id.* at 381, 215 S.E.2d at 436.
49. *Id.* at 381-82, 215 S.E.2d at 436.

Justice Ness found the constrictive interpretation of section 10-2623 used by the majority to be an unwarranted frustration of the legislative intent and cited *Truesdale* as an indication of the previous desire of the supreme court not "to yoke the Tort Claims Act with rigid constructions ill calculated to further the purposes of the Act . . . ."[50]

It is difficult to reconcile *Truesdale* with *Morris*. The former case appeared to indicate that the supreme court would view the actions of the Highway Department in light of the apparent legislative intent to allow private individuals redress for damage caused by the negligence of governmental employees. The latter case seems to indicate that the court will jealously guard the right of the State to exempt itself from suit, allowing only those actions to be brought which are undeniably within the explicit language of the statutes. *Truesdale* implies a greater concern with the rights of an injured plaintiff than with the right of the State to be free from suit, while the latter case implies the reverse. It is interesting to note that Justice (now Chief Justice) Lewis was the only justice to side with the majority in both cases. However, this is not especially helpful since he did not write either opinion.

One possible explanation of this difference in the supreme court's approach is a variation of the "but for" test of liability. But for the Highway Department's performing its official duties of building and repairing roads, the pickup truck in *Truesdale* would never have been where it was at the time of the accident. Indeed it never would have been set upon the highway at all. On the other hand, even if the Highway Department had not allowed the patrolman in *Morris* to use his patrol car for personal business, the patrolman would probably have taken the trip anyway using his personal car instead. The Department's sanction of his use of the patrol car for personal business in no way added to the jeopardy of the plaintiff. No extra vehicles were sent upon the road and no special hazards were created as happened in *Truesdale*. Departmental actions had little or no effect on the circumstances leading up to the fatal collision.

Since *Morris* was decided a month after *Truesdale* and since the author of one of the dissents in *Morris* as well as the majority opinion in *Truesdale* has retired from the bench,[51] it would probably serve attorneys well when faced with a similar problem in-

50. *Id.* at 381, 215 S.E.2d at 436. *See* notes 7-10 and accompanying text *supra*.

51. Justice Bussey retired in 1975, as did Chief Justice Moss.

volving sovereign immunity to do everything possible to characterize their facts so that they unquestionably fit under whatever statutory exemption to sovereign immunity is provided. Failing that, attorneys should perhaps attempt to characterize the facts in terms of the "but for" test mentioned above.

II. SUDDEN EMERGENCY

In another 3-2 decision, the supreme court held that a trial court's charge on sudden emergency in a case involving a wrongful death action on behalf of an 8-year-old boy who collided with the defendant's car, the defendant not having seen the child, was at most harmless error. Justice Littlejohn, writing the opinion in *Wiggins v. Thomas*,[52] noted the following pertinent facts. The defendant, who was driving on a four-lane highway in the outside lane, asserted that there was a car in the adjacent lane a little ahead of her which obscured her vision of the concrete median dividing the highway. The deceased child had been standing on the median attempting to cross the highway together with several other children. Suddenly he darted into the highway colliding with the defendant's car. The defendant did not see the child until the moment of impact. The trial judge charged the jury on the law of negligence, recklessness, willfullness and wantonness, contributory negligence, and, despite the repeated protests of plaintiff's counsel, sudden emergency. The jury returned a verdict for the defendant and the plaintiff appealed.

Justice Littlejohn noted that sudden emergency is "not a defense in and of itself,"[53] but rather it is "merely a portion of the overall charge of the law of negligence. . . ."[54] The supreme court then held that the plaintiff had failed to carry the burden of showing that the charge could have prejudiced his case.

Justice Bussey, dissenting in an opinion which was concurred in by Justice (now Chief Justice) Lewis, felt that the charge on sudden emergency was both erroneous and prejudicial and contended that a new trial should be granted. Justice Bussey elaborated on the facts as presented in the majority opinion, revealing several important discrepancies in the testimony of the witnesses. The most important discrepancy was the conflict in testimony concerning the existence or nonexistence of the car in the adjoin-

52. 264 S.C. 360, 215 S.E.2d 426 (1975).
53. *Id.* at 365, 215 S.E.2d at 428.
54. *Id.*

ing lane which the defendant claimed obstructed her view of the children standing on the median. Justice Bussey noted that only the defendant and her husband testified that the car was in the adjoining lane a little ahead of their car. The other witnesses apparently testified that there was no such car and the defendant's view was unobstructed. Additionally the defendant had been licensed to drive for only 10 days; her husband, whom she was driving to work, was already 20 minutes late; and the defendant was familiar with the area and knew children frequently crossed the road at the point where the collision took place. Finally, it was testified that one of the other children had crossed safely in front of the defendant without being seen by her.[55]

Justice Bussey noted that in order for the sudden emergency doctrine to have any application to a situation, the actor must *realize* that he is faced with an emergency and must make an immediate decision to try to avoid or minimize the danger.[56] Since the testimony of the defendant was to the effect that she did not see the child until just prior to, or right at, impact, there was no time for her to even recognize the danger, much less make even the hastiest decision about how to avoid it.

Since the evidence strongly suggested liability on the defendant's part, the dissent felt there was a "reasonable probability"[57] that the jury might have been confused by the instruction[58] and thus thought the case should be remanded for a new trial.

III. PRODUCTS LIABILITY - BREACH OF WARRANTY

In *Imperial Die Casting Co. v. Covil Insulation Co.*[59] the su-

55. *Id.* at 366-67, 215 S.E.2d at 429.

56. *Id.* at 368, 215 S.E.2d at 429; *see* McVey v. Whittington, 248 S.C. 447, 151 S.E.2d 92 (1966); Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964); Porter v. Cook, 196 S.C. 433, 13 S.E.2d 486 (1941); W. PROSSER, LAW OF TORTS § 33 (4th ed. 1971); Wise, *The Sudden Emergency Doctrine as Applied in South Carolina,* 20 S.C.L. REV. 408 (1968).

57. The reasonable probability test as to the effect of extraneous matter prejudicially influencing the jury has been stated in two different ways in South Carolina. In Entzminger v. Seigler, 186 S.C. 194, 200, 195 S.E. 244, 246 (1938), the supreme court spoke in terms of there being "a reasonable probability that the jury was influenced." On the other hand, the court in Powers v. Temple, 250 S.C. 149, 160, 156 S.E.2d 759, 764 (1967), used the converse of the test expressed in *Entzminger* noting that "[w]e cannot say with any reasonable certainty that the erroneous admission of this evidence did not, in fact, prejudice plaintiff's case."

58. The dissent noted that the instruction on sudden emergency came near the end of the charge and was explained at some length by the trial judge and that any confusion created by the charge would thus have been magnified. 264 S.C. at 369, 215 S.E.2d at 430.

59. 264 S.C. 604, 216 S.E.2d 532 (1975).

preme court considered for the first time whether contributory negligence is a defense to an action brought on breach of warranty.[60] The action was brought by the plaintiffs to recover damages suffered when a ventilation system installed by the defendant malfunctioned, causing a fire. The fire had spread rapidly after igniting the insulation installed by a co-defendant, who allegedly had warranted that the insulation was non-flammable. Both the building and its contents were destroyed. The trial court granted the plaintiff's motion to strike the defendants' second answer to the breach of warranty count alleging contributory negligence and the defendant[61] appealed.[62]

In a unanimous decision the supreme court held that contributory negligence was not a defense to a breach of warranty action. In adopting what it perceived as the majority view,[63] the court relied heavily on the reasoning of *Brown v. Chapman.*[64] *Brown* quoted from *Hansen v. Firestone Tire & Rubber Co.*:[65]

> Negligence on the part of the buyer would not operate as a defense to a breach of warranty. If the manufacturer chooses to extend the scope of his liability by certifying certain qualities as existent, the negligent acts of the buyer, bringing about the

60. The plaintiffs (owners and lessors of a building) alleged in their complaint the breach of an express or implied warranty that the ventilating systems installed by the defendant Piper would safely evacuate heat and fumes from the plaintiff's building and further that they would constitute no fire hazard to the building. Plaintiffs also alleged as a cause of action negligence on the defendants' part.

61. Covil and a co-defendant, North Carolina Foam Insulation, which supplied the raw insulation material used in the building, settled with the plaintiff. Only J.A. Piper Roofing Co. (Piper), which installed the faulty ventilation system, remained as a defendant.

62. Piper appealed also on the ground that the complaint alleged two causes of action (negligence and breach of warranty) and that the trial court erred in not granting the defendant's motion to require the plaintiffs to make an election as to which theory they would proceed under. Citing Glenn v. E.I. DuPont de Nemours & Co., 250 S.C. 323, 157 S.E.2d 630 (1967) as controlling, the supreme court held that no election was required. The court concluded that there was but one primary wrong and the plaintiffs sought only one recovery. Because genuine issues of fact remained after extensive discovery and because the two different theories required the proof of somewhat different elements, the supreme court reasoned that the plaintiffs should not be put to an election which might jeopardize their recovery.

63. It is somewhat unclear just which is the majority view. Of the cases cited in 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01[3] (1976 & Supp. May 1976), only 13 jurisdictions are cited as allowing contributory negligence as a defense. The instant case is not yet listed.

64. 304 F.2d 149 (9th Cir. 1962).

65. 276 F.2d 254 (6th Cir. 1960).

revelation that the qualities do not exist, would not defeat recovery. . .[66]

The court, prompted by the defendant-appellant's concern that the trial court on remand might misinterpret the opinion, was careful to distinguish between contributory negligence, which is not a defense, and the misuse and/or abuse of a product, which goes directly to the matter of proximate cause.[67] The supreme court noted that "[u]nder a general denial a defendant may always introduce any evidence which tends to disprove that which the plaintiff must prove as a basis for recovery."[68] Therefore, the court concluded, the defendant "should be allowed to introduce any evidence that the misuse or abuse of the product was the proximate cause of the damages."[69]

In drawing the distinction between contributory negligence and misuse or abuse, the supreme court joined the reasoning of two leading commentators in the area of products liability.[70] In addition, the *Imperial Die* decision does not preclude the use by defendant of the defense of assumption of risk. Another leading authority has explained the seeming disagreement over whether or not contributory negligence is a defense to a breach of warranty action in terms of the plaintiff's knowledge of the risk.[71] Virtually all the cases which have held that contributory negligence is a defense to breach of warranty have involved situations where the plaintiff voluntarily encountered a known unreasonable danger,[72] which situations tend to closely resemble assumption of risk. On the other hand, most of the cases which have held that contributory negligence was not a defense to breach of warranty action have involved situations where the plaintiff failed to discover the danger in the product or to take precautions against the possibility of its existence.[73] Thus attorneys desiring to assert the plain-

66. *Id.* at 258, *as quoted in* Imperial Die Casting Co. v. Covil Insulation Co., 264 S.C. 604, 609, 216 S.E.2d 532, 534 (1975).

67. 264 S.C. at 610, 216 S.E.2d at 534.

68. *Id.*

69. *Id.*

70. *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01[3] (1976).

71. W. PROSSER, LAW OF TORTS § 102 (4th ed. 1971).

72. *See, e.g.*, Erdman v. Johnson Bros. Radio & Television Co., 260 Md. 190, 271 A.2d 744 (1970) (evidence of use of T.V. set after sparks and smoke were observed emitting from set); Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952) (use of bags knowing there were holes in them); Finks v. Viking Refrigerators, 235 Mo. App. 699, 147 S.W.2d 124 (1940) (continued use of refrigerated display case after discovering it was unfit).

73. *See, e.g.*, Chapman v. Brown, 304 F.2d 149 (9th Cir. 1962) (extraordinarily

tiff's negligence as a defense should seek to characterize that negligence as either misuse or abuse of the product going to the matter of proximate cause or else they should try to characterize the negligence as a voluntary encounter with a danger known to be unreasonable, thus being more closely akin to assumption of risk than traditional contributory negligence.[74]

IV. MISCELLANEOUS

A. *Res Ipsa Loquitur*

Continuing its animosity to the doctrine, the supreme court again rejected res ipsa loquitur as a basis for tort liability in *Legette v. Smith*,[75] adhering to its previous decisions[76] on the matter. This wrongful death action was brought by the parents of a three-year-old boy against the contractor who constructed a septic tank two and one-half years prior to the fatal accident. The boy drowned after the lid of the tank collapsed. No one saw the accident occur. The plaintiff presented no evidence as to the cause of the lid's collapsing nor as to any negligence on the contractor's part in installing it, except to testify that no vehicles had driven over it since it had been installed. After all the testimony was presented, the trial court directed a verdict for the defendant. Plaintiff appealed, alleging error on the part of the trial court (1) in ruling that the evidence did not support one or more of the allegations of negligence, and (2) in failing to apply the doctrine of res ipsa loquitur. The supreme court rejected these contentions and affirmed the ruling of the trial court.[77]

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flammable dress negligently ignited by cigarette ash); Vassalo v. Sabatte Land Co., 212 Cal. App.2d 11, 27 Cal. Rptr. 814 (1963) (exploding bottle case); Richard v. H.P. Hood & Sons, 104 R.I. 267, 243 A.2d 910 (1968) (failure to discover shard of glass in paper cap). *But see* Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alas. 1967) (any implied warranty of workmanlike service would give rise to same standard of care required in negligence action and therefore defense of contributory negligence would be applicable).

74. However, such characterization seems unnecessary for cases arising under the Uniform Sales Act. These cases have consistently denied recovery to the buyer who failed to adequately inspect the merchandise, when such inspection would have revealed the defect. *See, e.g.*, Dunbar Bros. Co. v. Consolidated Iron Steel Mfg. Co., 23 F.2d 416 (2d Cir. 1928); Salzman v. Maldaver, 315 Mich. 403, 24 N.W.2d 161 (1946); Richards v. Watertite Co., 169 Neb. 263, 99 N.W.2d 265 (1959).

75. 265 S.C. 573, 220 S.E.2d 429 (1975).

76. *See, e.g.*, Shepherd v. United States Fidelity & Guar. Co., 233 S.C. 536, 106 S.E.2d 381 (1958); Daniels v. Timmons, 216 S.C. 539, 59 S.E.2d 149, *cert. denied*, 340 U.S. 841 (1950); Heath v. Town of Darlington, 175 S.C. 27, 177 S.E. 894 (1934); Bridge v. Orange Crush Bottlers, 164 S.C. 351, 162 S.E. 325 (1931).

77. 265 S.C. at 575-77, 220 S.E.2d at 429-30.

B. *Relieving Contractor of Liability*

A contractor may not be relieved of liability by acceptance of the project by some party other than the contracting party. In *Smith v. Fitton and Pittman, Inc.*,[78] the supreme court distinguished *Clyde v. Sumerel*[79] which had held that a "contractor is not liable to a third person receiving injury or damage as a result of the negligent construction of the work, after the completion and acceptance thereof by the contractee or owner."[80] In *Smith,* however, the defendant's work had not been accepted by the contracting party, a telephone company, but rather it had been "accepted" by an agent of the land owner on whose property the replaced telephone pole was located. Defendant was unable to show that the agent, a mechanic, had actual or apparent authority, or the inherent agency power to accept work for the replacement of a telephone pole and thus authorize the workmen to leave the old hole unfilled. Even if the mechanic had had such authority from the land owner, the court noted that would not have relieved the liability of the defendant since, as an independent contractor, it "was charged with a duty of due care to leave the premises in a safe condition, that is, free from any hazards which [it] may have created,"[81] and, even under *Clyde,* that liability could be relieved only by the contracting party.

C. *Malicious Prosecution*

Dismissal of a criminal charge does not constitute sufficient evidence, in and of itself, to support a cause of action for malicious prosecution. To sustain such a cause of action, there must be shown to have been an absence of probable cause as to the original charge.[82] In *Ruff v. Eckerds Drugs, Inc.*,[83] the South Caro-

78. 264 S.C. 129, 212 S.E.2d 925 (1975).

79. 233 S.C. 228, 104 S.E.2d 392 (1958).

80. *Id.* at 232-33, 104 S.E.2d at 393. To some extent this rule has been modified by Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968), which held a contractor-vendor liable for injuries caused by negligent construction and failure to warn the vendee of an unreasonably dangerous condition.

81. 264 S.C. at 133, 212 S.E.2d at 926.

82. To maintain an action for malicious prosecution, plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause, and (6) resulting injury or damage.
Parrot v. Plowden Motor Co., 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965).

83. 265 S.C. 563, 220 S.E.2d 649 (1975).

lina Supreme Court held, in effect, that a layman could not be held liable for malicious prosecution merely because he instituted legal proceedings against a person, part of which were later dismissed by the magistrate. The defendant caused a warrant to be issued by the magistrate charging the plaintiff with disorderly conduct and simple assault.[84] The plaintiff was convicted of simple assault but the disorderly conduct charge was dismissed which dismissal constituted the gravamen of the malicious prosecution action against the defendant.

While noting that disorderly conduct and simple assault were "independent charges with separate elements,"[85] the court went on to say that "they are sufficiently similar to a layman that an action for malicious prosecution should not be available, where, as here, both charges arise out of the same set of circumstances."[86] The court also noted that malicious prosecution was a cause of action "for the innocent victim who has been haled into court on baseless charges"[87] and found that the plaintiff, having been convicted of simple assault, was not an innocent victim but rather was guilty of a criminal offense.

Concurring with the plaintiff that malice may be implied from a want of probable cause,[88] the supreme court nevertheless disagreed that dismissal of the disorderly conduct charge constituted an absence of probable cause. Reviewing a definition of probable cause,[89] the court found the defendant had probable cause to have instigated the actions against the plaintiff. The court then threw in a gratuitous statement which might lead to some confusion regarding the effect of the decision: "It affirmatively appearing that the [plaintiff] was guilty of the criminal offense of simple assault, he cannot successfully maintain this action for malicious prosecution."[90] While the statement is

84. The manager of defendant's store confronted plaintiff and three companions, suspecting them of shoplifting. The plaintiff assaulted the manager who then followed plaintiff out of the store and accused him of shoplifting. The manager exchanged words with the plaintiff and attempted unsuccessfully to make a citizen's arrest.

85. *Id.* at 566, 220 S.E.2d at 651; *see* State v. Hill, 254 S.C. 321, 175 S.E.2d 227 (1970).

86. 265 S.C. at 567, 220 S.E.2d at 651.

87. *Id.*

88. *Id.* at 568, 220 S.E.2d at 651; *see* Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961).

89. "[T]he existence of such facts or circumstances as would excite the belief of a reasonable mind, acting on facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." BLACK'S LAW DICTIONARY 1365 (rev. 4th ed. 1968), *as quoted in* 265 S.C. at 568, 220 S.E. at 652.

90. 265 S.C. at 568, 220 S.E.2d at 652.

unquestionably correct, it could conceivably be read, together with the discussion of probable cause, to imply that the defendant would not have had probable cause if the plaintiff had not been convicted of one of the crimes he was charged with. This is certainly not what the court intended, but the above sentence throws the matter in some doubt.[91]

D. *Last Clear Chance*

In an unpublished[92] order denying respondent's petition for a rehearing,[93] Chief Justice Moss and Justice Littlejohn joined with Justice Brailsford in holding the last clear chance doctrine inapplicable to the facts presented in *Oliver v. Brazell.*[94] In so doing the court continued its previous, though unasserted, policy of distinguishing between the "helpless" plaintiff and the "inattentive" plaintiff in deciding the applicability of the last clear chance doctrine to a particular set of facts.[95]

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91. An excellent explanation of the probable cause a prosecutor must have had in order to defeat subsequent action for malicious prosecution is found in Cook v. Lanier, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966):

> Probable cause for a criminal prosecution does not depend upon the guilt or innocence of the accused of the crime charged, nor upon the fact as to whether a crime has actually been committed, but depends on the prosecutor's honest belief in such guilt based on reasonable grounds. It is a case of apparent, rather than actual, guilt.

92. The author is indebted to Isadore A. Bernstein, Esq., attorney for the plaintiff-respondent, for bringing this unpublished order to his attention.

93. Oliver v. Brazell, No. 19926 (S.C., filed Apr. 7, 1975). The petition for rehearing was based on S.C. Const. art. 5, § 2 which requires "[i]n all cases decided by the Supreme Court, the concurrence of three of the justices shall be necessary for a reversal of the judgment below." Since two justices voted to reverse and enter judgment for the defendant, and the other justice who voted to reverse did so because he felt that the trial court's instruction on last clear chance was both erroneous and prejudicial, the three justices who had voted to reverse had not concurred on the reason why reversal was proper.

94. 264 S.C. 53, 212 S.E.2d 922 (1974).

95. For an excellent discussion of last clear chance and *Oliver v. Brazell,* see *Torts, 1974 Survey of South Carolina Law,* 27 S.C.L. REV. 554, 562-73 (1975).